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IN THE

Supreme Court of the United States

No. 73 OF OCTOBER TERM, 1930

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, APPELLANT,

v.

UNITED STATES OF AMERICA, GUYANDOT AND TUG RIVER RAILROAD COMPANY, NORFOLK & WESTERN RAILWAY COMPANY, AND INTERSTATE COMMERCE COMMISSION, APPELLEES.

Reply of Appellant to Briefs Filed on Behalf of the Governmental Appellees and the Corporate Appellees, Respectively.

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LEWIS PRINTING CO., INC., RICHMOND, VA.

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Reply of Appellant to Briefs Filed on Behalf of the Governmental Appellees and the Corporate Appellees, Respectively.

Two briefs have been filed herein on behalf of appellees: one jointly by the United States and the Interstate Commerce Commission (hereinafter together referred to as the "United States"), and the other jointly by the Norfolk and Western Railway Company and its subsidiary, the Guyandot and Tug River Railroad Com-

pany (hereinafter together referred to as the "Norfolk"). Because both briefs raise a defense based upon a question of law not presented by appellees to the court below, a reply would be necessary in any event; and it is additionally important in view of a number of questions of fact and of law presented by both briefs. Moreover, two decisions rendered by this Court since our Opening Brief was prepared have, as we shall see, a very distinct bearing upon the issues in this case.

We shall first notice the points, principally of law, common to both briefs, and then call attention to other matters, principally of fact, which require special mention. The discussion will take the following order:

(1) The contention, now for the first time advanced by appellees, that the appellant is without the interest requisite to the institution and maintenance of this suit.

(2) The assertion that the Commission's order comprised an administrative plan, not severable as between the authorities granted respectively to the Norfolk and the Virginian.

(3) The question whether substantial evidence supports the order, there being shown in this connection the immediate bearing of the two cases just decided by this Court, and referred to above.

(4) A more detailed treatment of statements of fact and of position in the opposing briefs to which exception is taken.

(5) Conclusion.

I.

APPELLANT HAS THE LEGAL INTEREST REQUISITE TO THE INSTITUTION AND MAINTENANCE OF THIS SUIT.

The appellees contend that under the decision of this Court in the case of *Alexander Sprunt & Son, Inc. et al., v. United States* (1930), 281 U. S. 249, and the decision of a three-judge district court in *Pennsylvania Railroad Co. v. United States, et al.* (W. D. Penna., 1930), 40 F. (2d) 921, appellant is without the legal interest requisite to entitle it to institute and maintain this suit (U. S. Brief, pp. 22-30; Norfolk's Brief, pp. 43-51). We are convinced that the court in *Pennsylvania Railroad Co. v. United States, supra,* and counsel for the appellees here, entirely misconceive the meaning and effect of the decision of this Court in the *Sprunt Case, supra.* The contention of appellees, if sound, is far-reaching; and we accordingly especially invite the attention of the Court to the issue thus presented.

The *Sprunt Case,* in the district court, was a consolidation of two suits separately brought to set aside an order of the Commission requiring certain carriers to remove undue prejudice and preference found to result from rates on cotton shipped from interior points to ports on the Gulf of Mexico, the first suit having been instituted by Alexander Sprunt & Son, Inc., and others, shippers interested in water-front compresses and warehouses, and the second by certain carriers affected by the order of the Commission. The district court upheld the Commission's order and entered a decree dismissing the bills.

None of the carriers appealed from the decree. Ac-

quiescing in the decision of the District Court and in the order of the Commission, they established the prescribed rate adjustment. The resulting situation, so far as the carriers were concerned, was declared by this Court to be "as if the new rates had been filed wholly of their own accord and as if there had never been a controversy before the Commission" (p. 256).

The shippers, however, appealed directly to this Court, where they were held to have no standing, in their own right, to attack the order of the Commission. The Court recognized that the order deprived the shippers of an advantage theretofore enjoyed over other competitors of 3.5 cents per hundred pounds, and that their economic position was thus worsened. But the full extent of the legal right of the shippers was, in the language of the Court, to "reasonable service at reasonable rates and without unjust discrimination. If such service and rates are accorded them, they cannot complain of the rate or practice enjoyed by their competitors or of the retraction of a competitive advantage to which they are not otherwise entitled" (p. 255). And this Court said further:

> "Why the carriers filed the new rate structure now in force is no concern of the appellants. If the carriers had done so wholly of their own motion, obviously these shippers would have had no ground of complaint, before any tribunal, unless the new rates were unreasonable or unjust. If they were believed by the appellants to be so, a complaint before the Commission would be the appropriate remedy" (p. 255).

It results that the full extent of the decision—which merely reaffirms the principle of *Hines, et al.*, v. *United*

States (1923), 263 U. S. 143, cited by appellees (U. S. Brief, p. 23)—is that a shipper benefiting by a given advantageous rate adjustment has no legal standing in court to insist upon the *status quo*, when the carrier, having the right so to do, modifies the rate adjustment in a manner rendering it less advantageous to the shipper. If the new adjustment is unreasonable or unjust, the shipper's recourse is in the first instance to the Commission, not to the courts. In this case there is no corresponding question to lay before the Commission.

The district court in the *Pennsylvania Railroad Case*, above referred to, apparently construes the *Sprunt* decision as denying to an interested carrier any legal standing to sue to set aside an affirmative order of the Commission authorizing new construction under paragraph 18 of Section 1 of the Interstate Commerce Act. We say the court "apparently" so decided—for the opinion is confused and the reasoning circular.

The order of the Commission involved in that case granted a certificate authorizing the Pittsburgh & West Virginia Railway Company to extend its line into Donora, a point theretofore exclusively served by the Pennsylvania. The latter carrier, conceiving the order to be void for want of any evidence of public convenience and necessity, sued to restrain the new construction. In its opinion dismissing the bill, the court, after dwelling upon the breadth of discretion committed to the Commission as a body of experts, came to the question, "Are there any facts?" and found that "there was * * * competent evidence on which the Commission could, and did, exercise its discretion with reference to the public convenience and necessity involved in the extension in dispute" (p. 924). Not until it had thus upheld the Commission's order upon the merits, did the court dis-

cuss the legal right of the Pennsylvania to sue. This curious approach is explained by the following statement:

> "Discussion of what is really the first question in the case, that of the right of the Pennsylvania Railroad Company to maintain its bill in view of its lack of legal right to the entire transportation business of Donora and for want of legal wrong, committed or threatened, or of legal injury inflicted, by the Commission's order, *has been purposely postponed until after the issues and facts of the case have been stated so that the question of law might stand out more sharply*" (p. 925; italics supplied).

But as we have seen, the court had not contented itself with *stating* "the issues and facts". What it had done was to state the facts and decide the merits. Then, coming to what it called "really the first question in the case", the opinion in large part paraphrases the language of this Court in the *Sprunt Case*, which it cites as the only authority for its conclusion, and goes on as follows:

> "True, the complainant now is and for a long time has been exclusively serving Donora and is now receiving the profits from handling all the traffic flowing into and out of that busy district. But that is a privilege rather than a right—a privilege to be enjoyed so long as it shall last, not a right to be asserted, unless it be found somewhere in the law, written or unwritten. Certainly there is no unwritten law that gives a carrier, first to serve a community, the right to hold its traffic against all competitors. It is equally certain that the written law—the Transportation Act of 1920—does not explicitly or implicitly accord a noncompetitive traffic area to the first taker as the law accords a trade-

mark to the first adopter. Instead of doing this the written law negatives such a right by providing expressly for the invasion by one carrier into a territory exclusively served by another on a showing of convenience and necessity of more transportation service for those inside reaching out and those outside reaching in. *Where, as here, the showing is lawfully made and the Commission has validly acted,* the carrier at whose expense the change is wrought has had no legal right invaded and has suffered no legal injury. In consequence it has nothing on which to sustain an independent suit to vacate and set aside *such an order* of the Interstate Commerce Commission" (p. 925; italics supplied).

Thus, not a statement of facts but a prior decision on the merits that the order complained of was valid was made to serve the end "that the question of law might stand out more sharply"!

We are sensible of doubt whether the court intended by the language last quoted to decide that the Pennsylvania could not rightfully bring the suit, or for the second time to decide that it could not prevail. If, as our opponents say, the decision denies the legal right of a carrier adversely affected to question in court the validity of a certificate of the Commission authorizing new construction, we submit (1) that it finds no support in the *Sprunt Case,* and (2) that it is plainly erroneous.

The *Sprunt Case* did not question the right *of the carriers* to sue for an injunction setting aside the order there in question. *It merely denied the right of a shipper to assert independently an interest purely incidental to and dependent upon a carrier right which was not by the carriers asserted.* In the *Pennsylvania Railroad Case,* had the Pennsylvania acquiesced in the order, the *Sprunt*

Case would have precluded a suit by an individual deprived of an economic advantage as a result of the order —as for instance a lessor to the Pennsylvania of terminal facilities at Donora under a perpetual lease calling for rental on a user basis. But that is all.

The fundamental error at the root both of the *Pennsylvania Railroad Case*, and the contention of our opponents as well, lies in the supposition that the legal right asserted in such a suit as that at bar involves any claim of absolute right to a noncompetitive status. It is perfectly true that the Transportation Act contemplates the extension of a railroad into territory already served by another--but only where validly authorized by the Commission as required in the interest of public convenience and necessity. The only right asserted is to protection from new competitive construction not validly authorized, but only colorably so through an order beyond the power of the Commission. As to competition, our contention is that the bare fact that new construction will create, preserve or promote the same gives no support to a certificate. But competition accompanied by "a showing of convenience and necessity of more transportation service for those inside reaching out and those outside reaching in", may of course support the granting of a certificate.

The private carrier right to protection from new competitive construction not required in the public interest arises by plain implication from the Transportation Act; for the Commission, in passing upon applications under Section 1 (18)-(20) acts in a quasi-judicial capacity, and if a carrier adversely affected by an affirmative order granting a certificate may not sue, then no judicial review is possible. In the *Chicago Junction Case* (1924), 264 U. S. 258, 264-6, it was held that in Section 5 (2) of the Act, "Congress by using the phrase 'whenever the

Commission is of opinion, after hearing,' prescribed quasi-judicial action" reviewable at the instance of a carrier adversely affected. Section 1 (19) provides that the application for and issuance of any certificate of public convenience and necessity shall be under such rules and regulations as to hearings as the Commission may from time to time prescribe, and provides that notice with the right to be heard shall be given the governors of all interested States and published in the press. In *Ex Parte* 94, *Procedure Under Barge Line Act* (1928), 148 I. C. C. 129, 135, the Commission held subsequent hearings sufficient under the Barge Line Act, saying that a certificate under that Act might issue "without the notice and hearing provided for in section 1 (19) of the Interstate Commerce Act." In the *Chicago Junction Case; supra*, it was said by this Court, 264 U. S. at p. 265, foot-note 10:

> "Transportation Act, 1920, like the original Act to Regulate Commerce and earlier amendments, distinguished, by the language used and, also, in other respects, between those orders which can be made only after hearing and those as to which no hearing is required. Thus, orders on applications for extension of line, for new construction, or for abandonment under Sec. 1, pars. 18-20, can be made only after hearing."

In *Colorado* v. *United States* (1926), 271 U. S. 153, 166, it was distinctly held that an order of the Commission under Section 1 (18) of the Interstate Commerce Act granting a certificate for abandonment was subject to judicial review. And in *Piedmont & N. Ry. Co.* v. *United States* (1930), 280 U. S. 469, 478, where this Court refused to set aside an order of the Commission denying a certificate of public convenience and necessity, it was said:

> "The case is entirely different from those cases where an application for a certificate is alleged to have been erroneously granted, as in *The Chicago Junction Case*, 264 U. S. 258, and *Colorado v: United States*, 271 U. S. 153. There, a judicial review is provided in order to protect a legal right of the plaintiff alleged to have been infringed by an order which authorizes affirmative action." (p. 478).

Quasi-judicial action necessarily implies judicial review. Yet if the contention that appellant cannot sue be sustained, there can be no review in convenience and necessity cases involving applications for new construction. If the certificate is refused, applicant has no redress, for the order is negative. If it is granted, any claim of independent right to sue by shippers is precluded by the doctrine of the *Sprunt Case*. Only carriers adversely affected have a shadow of claim to sue for nullification of a void affirmative order. Therefore, we submit, a legal standing to institute and maintain this suit is accorded appellant by necessary implication; for otherwise reviewable action by the Commission must needs go unreviewed.

It would, indeed, be a remarkable thing were the Transportation Act so construed as to withhold judicial review of the Commission's action with respect to new construction, for the provisions requiring certificates of public convenience and necessity are among the major central departures from the past whereby a new and affirmative policy of regulation was brought into operation. It is not conceivable that Congress intended to vest in the Commission uncontrolled discretion as to this vital matter, at the same time affording judicial review as to rate-making, divisions, joint use of terminals, and other matters.

Moreover, to construe the Act otherwise than as conferring the right to sue upon a carrier situated as is appellant, would bring directly into point the following language of this Court in *Interstate Commerce Commission* v. *L. & N. R. R. Co.* (1913), 227 U. S. 88, 91:

> "And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power."

In our Opening Brief, we relied upon three cases as sustaining the jurisdiction of the Court: *Piedmont & N. Ry. Co.* v. *United States, supra; Chicago Junction Case, supra;* and *Texas & Pac. Ry.* v. *Gulf, etc., Ry.* (1926), 270 U. S. 266 (Opening Brief, pp. 65-8).

As to the last-named case, both the United States and the Norfolk point out that the construction there involved was underaken by the carrier without securing a certificate from the Commission, and that in such cases a right to sue is expressly conferred by Section 1(20) of the Act upon "any party in interest". (U. S. Brief, p. 28; Norfolk's Brief, p. 45). We are disposed to agree that this express grant of a right to sue renders inappropriate our citation of the case to the jurisdictional point here involved. We would observe, however, that upon the merits of the controversy, the case remains indistinguishable (Opening Brief, pp. 58-60).

Of the *Chicago Junction Case,* both opposing briefs observe that the order of the Commission there under attack was entered under Section 5(2) and the Government notices that the attack of the carriers upon the order "was upheld because the order caused them injury by depriving them of the equality of treatment to which carriers are 'as fully entitled as any shipper' " (U. S. Brief, p. 30, footnote 10; Norfolk's Brief, pp. 44-5). The fact remains, however, that the right of the carriers to sue was challenged in that case and upheld, although, as this Court pointed out, before Transportation Act, 1920, the Interstate Commerce Act would neither have prohibited the owners from selling nor the New York Central from purchasing the terminal facilities involved in the controversy. Nor was the right to sue expressly conferred by the Act. Yet because the Act, *inter alia,* prohibited any acquisition of a railroad by a carrier unless authorized by the Commission, "the plaintiffs, being competitors of the New York Central, and users of the terminal railroads theretofore neutral, have a special interest in the proposal to transfer control to that company". We submit that this case, upholding the right of carriers adversely affected to sue to set aside an order of the Commission, even though there has been no invasion of any common law right and without the authority of express statutory provision, is direct authority for the legal right of appellant here to sue. For here, as there, the right of the plaintiff arises by implication from a statutory prohibition, actual or constructive, removable only by valid authorization of the Commission. This Court, in the *Sprunt Case, supra,* at p. 257, distinguished the *Chicago Junction Case,* observing (footnote 5):

> "In the *Chicago Junction Case*, the order violated the plaintiff's right under paragraph 2 of section 5 (49 U. S. C. A. Sec. 5 (2)) to equal treatment; and the plaintiff, with those similarly situated, was the only person in interest against the order."

We have shown that appellant here is "the only person in interest against the order", and that if it may not sue then the courts are powerless to review any action of the Commission under Section 1(18)-(20), because there is no one to set their machinery in motion.

The United States refrains from criticism of appellant's treatment of *Piedmont & N. Ry.* v. *United States, supra,* but the Norfolk comments that the order there attacked denied an application for a certificate under Section 1(18) and that the court refused the relief prayed because if the order was beyond the Commission's jurisdiction "then obviously the order is no obstacle to the railway's plan" (Norfolk's Brief, p. 44). We stated in our Opening Brief, pp. 66-7, that the order involved in that case was negative, and that this was the very fact which occasioned the Court to distinguish the *Chicago Junction Case* and *Colorado* v. *United States* upon the ground, equally predicable of the instant suit, that "there, a judicial review is provided in order to protect a legal right of the plaintiff alleged to have been infringed by an order which authorizes affirmative action".

The United States seeks to establish an analogy between this suit and hypothetical suits brought by one carrier to set aside orders of the Commission granting to a rival carrier (1) authority to issue new securities and (2) authority to include a given third carrier in its system through consolidation (U. S. Brief, pp. 29-30). We deny any analogy. In this suit, appellant seeks protection from injury threatened through diversion of traffic

which would otherwise move over its own superior and wholly adequate line to an inferior, uneconomical and unnecessary line the proposed construction of which is not required in the public interest. Such an interest cannot be likened to a desire to prevent the issue of securities by a rival carrier, for the economic effect, if any, of such issue upon the plaintiff is remote and consequential only. Nor can any analogy be sustained between appellant's interest here and that which would be asserted in a suit to enjoin an order authorizing consolidation. Should the injunction prayed for herein be granted, appellant will have the legal right to transport all the traffic delivered by the Virginian at Gilbert. But even should a consolidation order be enjoined, no legal right of consolidation would exist in the rival plaintiff. Authorization by an affirmative order of the Commission would still be required.

Upon this branch of the case, we confidently submit that the affirmative order of the Commission under attack is subject to judicial review (*Piedmont & N. Ry. Co.* v. *United States* (1930), 280 U. S. 469; *Colorado* v. *United States* (1926), 271 U. S. 153; *Chicago Junction Case* (1924), 264 U. S. 258) at the instance of appellant as the only party in interest against the order (*Sprunt & Son, Inc.*, v. *United States* (1930), 281 U. S. 249; *Chicago Junction Case, supra*), and that the argument of our opponents to the contrary is based upon a misconception of the holding of this Court in the *Sprunt Case, supra*, and can lead only to the impossible result that the judicially reviewable action of the Commission in granting certificates of public convenience and necessity under Section 1 (18) of the Act cannot be reviewed for want of any proper party to set in motion the processes of the court.

II.

THE ACTION OF THE COMMISSION IN AUTHORIZING THE GILBERT-WHARNCLIFFE LINE IS SEVERABLE FROM ITS ACTION WITH RESPECT TO THE ITMANN-GILBERT LINE AND THE COURT WILL NOT BY GRANTING THE INJUNCTION PRAYED FOR HEREIN SUBSTITUTE ITS JUDGMENT FOR THAT OF THE COMMISSION UPON AN ADMINISTRATIVE QUESTION.

Counsel for the United States insist that the Commission authorized construction by the Virginian of the Itmann-Gilbert line and construction by the Norfolk of the Gilbert-Wharncliffe line as interrelated parts of a single administrative plan (U. S. Brief, pp. 14-22), and in this position they are now joined by the Norfolk (Norfolk Brief, pp. 51-4), although no such position was taken by it in the court below. This insistence is sought to be fortified by recital of considerations which are stated by counsel—but not shown by the Commission's report—to have induced the action of the Commission with respect to construction of the one as well as the other line (U. S. Brief, pp. 17-21). The gist of the position is contained in the following sentence (U. S. Brief, pp. 21-2):

> "Certainly it cannot be said that, if the Commission had known that the one part of its order would be enjoined, it still would have prescribed the exact plan of lines contained in the balance of its order."

In the first place, we call attention to the absence of any indication in the order of the Commission that

the authorities granted the Virginian and the Norfolk, respectively, were in any way conditional or interdependent. This is important in view of the uniform practice of the Commission, in cases where any condition attaches to the authority granted by its certificate, of setting forth such condition in express terms in its order. See, for example, orders entered in *Construction of Lines in Eastern Oregon* (1926), 111 I. C. C. 3, 58-60; *Construction of Line by Chicago, Rock Island & Pacific Ry.* (1926), 111 I. C. C. 347, 353-4; *Construction and Abandonment of Lines by Chicago & North Western Ry. Co.* (1926), 111 I. C. C. 313, 316-17; *Abandonment of Line by Choctaw, Oklahoma & Gulf R. R.* (1926), 111 I. C. C. 81, 83-4; *Construction of Line by Waco, Beaumont, Trinity & Sabine Ry.* (1927), 124 I. C. C. 769, 807-9; *Control of Central California Traction Company* (1927), 131 I. C. C. 125, 139-40; *Proposed Construction of Branch Line by Pere Marquette Railway* (1928), 138 I. C. C. 699, 714; *Construction and Acquisition of Lines by Algiers, Winslow and Western Railway Company* (1928), 145 I. C. C. 123, 129-30; *Construction and Abandonment by Southern Pacific Company* (1928), 145 I. C. C. 515, 517-18; *Quanah, Acme & Pacific Railway Company Construction* (1930), 158 I. C. C. 699, 703-4; *Gulf & West Texas Ry. Co. Construction* (1930), 158 I. C. C. 563, 575-6; and *Extension of Miami Municipal Railroad* (1929), 158 I. C. C. 169, 179-81.

But, without repeating all that was said in our Opening Brief, we submit as a conclusive reply the fact that the Commission by affirmative action gave its administrative sanction to construction of the Virginian's Itmann-Gilbert line even in the event that the Norfolk's Gilbert-Wharncliffe line should not be built. In appellant's Opening Brief, p. 8, it is shown that upon petition of

appellant for rehearing as to authorization of the Gilbert-Wharncliffe line *only*, the Commission, on October 20, 1928, permitted its authorization of the Virginian's Itmann-Gilbert line to *take effect*, at the same time *suspending* its authorization of the Norfolk's Gilbert-Wharncliffe line; and on page 45 of that brief it is pointed out that by this action the Commission *necessarily declared that whatever might be done as to the Gilbert-Wharncliffe line*, the Virginian's Itmann-Gilbert line should be permitted. It inevitably results that this Court cannot regard the line of the Norfolk and that of the Virginian as interdependent parts of a unified administrative plan.

This conclusive point was clearly and explicitly made in our Opening Brief. As to it, both opposing briefs preserve a significant silence.

Appellees argue that the Court cannot substitute its judgment for that of the Commission upon administrative questions. We agree. But were this Court to hold that the order of the Commission is not severable as to the Gilbert-Wharncliffe line because construction of that line and of the new line of the Virginian constitute a unified and indivisable administrative plan, it would substitute its own judgment to that effect for the expressed judgment of the Commission squarely to the contrary.

III.

THE COMMISSION'S AUTHORIZATION OF THE GILBERT-WHARNCLIFFE LINE IS VOID FOR WANT OF ANY SUBSTANTIAL EVIDENCE OF PUBLIC CONVENIENCE AND NECESSITY FOR CONSTRUCTION AND OPERATION OF THE LINE AND BECAUSE BASED UPON A MISCONCEPTION OF THE APPLICABLE LAW.

Was the finding by the Commission of public convenience and necessity for the Gilbert-Wharncliffe line supported by substantial evidence?

The decisions of this Court in *The Beaumont, Sour Lake & Western Railway Company* v. *United States,* decided November 24, 1930, 282 U. S. ....., and in *Florida, et al.* v. *United States,* decided January 5, 1931, 282 U. S. ....., bear most strikingly upon the approach to and argument of this question by both the United States and the Norfolk, as well as upon the disposition made of the case by the court below. The opinion in *The Beaumont, Sour Lake & Western Case* calls upon the Commission to state with clarity and completeness in its report the reasons for its determinations, and declares:

> "The general statements in the reports to the effect that the Commission in reaching its conclusions considered all the pertinent evidence add nothing to the *prima facie* presumption that generally attends determinations of the Commission."

The opinion in *Florida* v. *United States* declares that the Court will not play the role of a fact-finding body and search the record for appropriate findings which per-

adventure might have been, but in fact were not, made by the Commission. Mr. Chief Justice Hughes said:

> "The Commission made no findings as to the revenue which had been derived by the carrier from the traffic in question, or which could reasonably be expected under the increased rates, or that the alteration of the intrastate rates would produce, or was likely to produce, additional income necessary to prevent an undue burden upon the carrier's interstate revenues and to maintain an adequate transportation service.
>
> "The question is not merely one of the absence of elaboration or of a suitably complete statement of the grounds of the Commission's determination, to the importance of which this Court has recently adverted (*The Beaumont, Sour Lake & Western Railway Company* v. *United States*, decided November 24, 1930, 282 U. S. .....), but of the lack of the basic or essential findings required to support the Commission's order. *In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body and the Court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported*" (italics supplied).

In the light of these decisions, we would recall the Court's attention to the phenomenon adverted to in our Opening Brief, p. 10, that in this case the appellant, although the party attacking the validity of the Commission's certificate, accepts as supported by the record every fact recited in the exhaustive report of the Commission as well as the only findings of that body as to

the Gilbert-Wharncliffe line, while those who uphold the validity of the order seek additional evidential support extraneous to the meager findings of the Commission. In the lower court, however, this fact-hunting was confined to considerations asserted to be deducible from the evidence, though not mentioned by the Commission in its report—such, for example, as the assertion that the Gilbert-Wharncliffe line is needed as a "cross-line" between the rails in the Tug River and Guyandot Valleys, respectively (Norfolk's Brief, pp. 42-3).

But in this Court the departure from the Commission's findings has been extended (1) to facts recited by counsel but not shown by the record, (2) to briefs, never introduced in this record, filed in the proceedings before the Commission by a carrier not party to this suit, and (3) to a brief filed by appellant in proceedings wholly distinct from the case at bar. Witness (1) the recitation of facts by counsel for the Norfolk in their paper filed herein entitled "Railway Construction Since Case Was Heard in the District Court"; (2) the extensive quotation by the Norfolk of assertions of fact by counsel for the Virginian in their Reply Brief before the Commission (Norfolk's Brief, pp. 26-7); and (3) the Norfolk's quotation from appellant's brief in Finance Docket 7562, where appellant was opposing a certificate for construction by the Virginian of a bridge at Deepwater (Norfolk's Brief, p. 15). The case is reported as *Virginian Railway Company Extension* (1930), 162 I. C. C. 552.

We question the right of the Norfolk to quote from briefs in other proceedings, and we submit that the impropriety of doing so is illustrated by the misleading effect of the quotation from appellant's brief in Finance Docket 7562. In that brief, we compared the route via the Virginian's proposed bridge at Deepwater with other

available routes, and we characterized appellant's route via Gilbert as extraordinarily efficient, commenting that if the Gilbert-Wharncliffe line is built another route almost as efficient will be available. Without stopping upon the point that we said nothing as to economy in operation of the Gilbert-Wharncliffe line, we point out that the Deepwater route, in appellant's view, at least, is incomparably worse than either the route via Wharncliffe or that via the Logan Subdivision and that, for the purposes of that comparison, the difference in favor of the Logan Subdivision was neither of great magnitude nor importance. Both routes were regarded as far superior to the route under attack, and that was the point we sought there to make. It is nevertheless true that the Logan Subdivision can accommodate all the business the Virginian can deliver at Gilbert, that its line has superior grades and can be far more economically operated than the costly Gilbert-Wharncliffe line, and that the showing of these facts upon this record does "appear conclusively to demonstrate the useless wastefulness of the proposed construction". That appellant should be compelled in argument here to discuss the Deepwater bridge case in order to remove an imputation that expediency overrides fact in the preparation of its briefs, we deem illustrative of the vice of departure from the record for statements which cannot be correctly understood when divorced from the context in which they are made. There can be no orderly discussion where the limits of relevancy are disregarded.

The argument upon the facts presented by both the United States and the Norfolk repeatedly invites this Court to assume the role of a fact-finding body, to go beyond the question whether the record gives support to findings made by the Commission, and to examine into

the matter whether the Commission might have reached other findings than those it actually made. Thus, the United States, in the following statements, dwells upon evidence none of which bears upon the only conclusion stated by the Commission to support the Gilbert-Wharncliffe line,—to-wit, that by its construction and operation the Norfolk will be enabled to compete with appellant for westbound traffic from the Guyandot Valley and shippers in that territory afforded competitive service:

> "While the tributary coal reserves of the N. & W. are much larger than those of the Virginian, they are only 60 per cent as large as those of the C. & O. (R. 55.) The N. & W. now receives a large amount of revenue from its participation in the westbound movement of coal from the Upper Guyandot Basin (R. 38, 39, 92), of which it would in large part have been deprived, if the court had prevented it from building the Gilbert-Wharncliffe extension while at the same time leaving the Virginian free to build the line from the Upper Guyandot Basin to a connection at Gilbert with the C. & O. only. The Commission, by authorizing the Virginian to build the line down Guyandot River to Gilbert, recognized that carrier's needs for additional coal reserves and for a more suitable outlet for westbound coal originating on its present lines." (U. S. Brief, p. 20);
>
> * * * *
>
> "Evidence submitted by the N. & W. (R. 213-214) and considered by the Commission (R. 42) showed that a proposed line from Elmore down the Guyandot River to Gilbert with extension beyond to Wharncliffe would reduce operating costs by about 14 cents per ton as compared with the costs over the route via Matoaka. R. 213 to 214.)" (U. S. Brief, p. 32);
>
> * * * *

> " * * * the evidence showed that there were large deposits of coal on Gilbert and Horsepen Creeks, estimated at from 120,000,000 tons to 170,000,000 tons. * * * There was testimony in the record that the deposits could best be developed by the Gilbert-Wharncliffe line or by a short branch extending from that line up Horsepen Creek. (R. 91, 226, 229.)" (U. S. Brief, p. 33).

The Norfolk joins the United States in emphasizing these evidential considerations (Norfolk's Brief, pp. 23-38), and adds particular reference to holdings in the Guyandot Valley of the Pocahontas Coal and Coke Company, its subsidiary, acquired for the purpose of suppressing competition of other carriers (Norfolk's Brief, p. 35; R. 207-8).

The Commission, however, did not find that the proposed line was needed to increase the coal reserves of the Norfolk, nor was any revenue need of that carrier ever adverted to as contributing to the necessity for this new construction. And as to our opponents' reference to Virginian coal reserves, it is impossible to see how they can be in any way affected by construction by the Norfolk of the line from Gilbert to Wharncliffe. The saving of 14 cents over the Matoaka route was not regarded by the Commission as justifying the line, for it did not predicate its conclusions upon that circumstance, a fact readily understandable in view of the still greater economy of appellant's wholly adequate line. Coal deposits on Gilbert and Horsepen Creeks were not found by the Commssion to support authorization of the line; and despite the assertion of the United States (p. 33) to the contrary, there was no testimony that these deposits could be reached better from the Norfolk's proposed line than from appellant's existing line and/or the Virginian's au-

thorized line. The United States cites the record at pages 91, 226 and 229, but examination will show that these references respectively establish merely (1) that the court below erroneously found as our opponents contend, (2) that the coal deposits can be reached from the proposed line, and (3) that the coal deposits do exist, without a scintilla of evidence to refute the testimony of the map itself that they can quite as readily be reached from other existing or authorized facilities (Opening Brief, pp. 20, 32-3). The assertion that the line is needed as a "cross-line" is simply without any evidential support whatever.* As to the Pocahontas holdings, the Norfolk's line will add nothing to their accessibility, which will be almost completely achieved by the Virginian's new construction. The willingness of the Norfolk to permit their exploitation bears legitimately upon the public interest only so far as that exploitation might bring revenue support to the Virginian's line, which would serve them as the initial carrier; and since the record shows that they are already largely under development under existing transportation conditions, the natural deduction follows that they will be developed when market conditions permit. Assuredly the completion of the Norfolk's original monopolistic design carries no suggestion of the promotion of the public interest.

It is not, indeed, asserted that these matters were distinctly found by the Commission to indicate public need for the proposed line, but it is said by the United States:

> "All the above evidence was considered at length in the Commission's report and entered into its ulti-

*The passage cited in support (Norfolk's Brief, p. 43) is R. 216, but all that is stated there is that the line "would afford railroad facilities" to jobbers at Williamson if they desired it and if the business offered required it. There is no showing of a need for the line. See Original Brief, pp. 25-6.

> mate determination and finding that the public convenience and necessity required or will require the construction of the Gilbert-Wharncliffe line." (U. S. Brief, p. 34).

We vouch the record for the assertion that the statement just quoted is without any foundation save the stereotyped words of the report (R. 57): "Upon the facts presented we find," etc. And as to that we have the authority of *The Beaumont, Sour Lake & Western Case, supra,* for the assertion that those words add nothing of substance to the effect of the report.

Competition, and only competition, was held by the Commission to warrant construction of the line between Gilbert and Wharncliffe. The United States and the Norfolk would have this Court find that the line is required in the public interest by reason of the other considerations just alluded to. We are here less concerned to dwell upon the inaptness of these considerations as tending to show public convenience and necessity, as to which we rely in the main upon our Opening Brief, than to urge that the court below, in basing its holdings upon matters not found by the Commission to be pertinent, substituted itself for the fact-finding body and exercised an administrative rather than a judicial discretion, and that our opponents now invite like action by this Court. But the invitation is certainly to be declined in view of what was held in *Florida* v. *United States, supra:* "The Commission is the fact-finding body and the Court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported."

We are thus led from the wilderness of judicial and forensic fact-seeking, to the clean cut question, Does

the record support the following findings as to the Gilbert-Wharncliffe line? (R. 57):

> "The construction of that part of the N. & W.'s proposed line from Wharncliffe to Gilbert would enable the N. & W. to compete with the C. & O. for westbound traffic from the Guyandot Valley, and would assure operators in the territory competitive service to the west."

The answer is not far to seek, for appellant admits that the proposed line would enable the Norfolk to compete with appellant and thereby afford competitive service to shippers. *It results, therefore, as appellant has conceived from the outset, that the issue in this suit turns squarely upon the naked question whether, under the Transportation Act of* 1920, *new construction can be validly authorized solely in order to beget or preserve competition for competition's sake alone.* And we confidently submit that it cannot be so held, for the policy of the law in requiring certificates of public convenience and necessity would thereby be set at naught. We need not here repeat our opening argument on this point (Opening Brief, pp. 30-32, 51-65).

It is needful, however, to notice briefly (1) the appellees' attempted distinction of the decision of this Court in *Texas & Pac. Ry.* v. *Gulf, etc., Ry.* (1926), 270 U. S. 266, and the holding of the Commission in the *Utah Terminal Case* (1922), 72 I. C. C. 89, relied upon in our Opening Brief, pp. 58-65, and (2) the argument of the appellees that competition may justify new construction.

(1) It is argued that the *Texas & Pacific Case* and the *Utah Terminal Case* are inapplicable here because those cases dealt with "invasion through new construction of

territory adequately served by another carrier," whereas, in this case, according to appellees, the territory involved is not now served by any carrier (Norfolk's Brief, pp. 21-3). The same point is otherwise indicated by the caution that " it should be kept in mind that the traffic which will come to it (the Norfolk) over the Itmann-Gilbert line is not traffic now enjoyed by the C. & O. but is new traffic that will be developed on a new line authorized by the same order that authorized the Gilbert-Wharncliffe line, and traffic from the Upper Guyandot Basin that will be diverted by the new line from present routes—in large part from the route via Matoaka and the lines of the N. & W." (U. S. Brief, p. 37). This argument is a mixture of law and of fact. In the next division of this brief we shall deal with it from the standpoint of fact. Its legal aspect is reducible to the absurdity that the law, while concerned to prevent unnecessary construction which will take away business already acquired by another carrier, is complacent as to wasteful construction in a competitive race for new business. But the Commission itself, in dealing with the Gilbert-Wharncliffe line, regarded the situation as though the Virginian's line were completed to a connection with appellant's line at Gilbert, and, considering the traffic as moving via the route thus afforded, it authorized the Gilbert-Wharncliffe line solely to the end that competition for that business by the Norfolk might be created.

(2) It is appellant's conception that the purpose of the law in requiring certificates of public convenience and necessity for new construction was to prevent the creation of railroad facilities for *purely* competitive purposes —and such purposes are the only ones the accomplishment of which was deemed by the Commission to justify the Gilbert-Wharncliffe line. But the appellees insist that

competition may justify new construction. And here they advance a *non sequitur*, saying:

> "Since the invasion by one carrier of the territory of another necessarily establishes competition, the power given the Commission to authorize such invasion negatives the idea that the benefits that may be obtained by establishing competition are not among the elements to be considered by the Commission." (U. S. Brief, p. 38.)

Plainly this confuses a result with a justification. From the fact that new construction may result in competition it does not follow that new construction may be authorized solely to that end. Nor does it follow, as contended by the appellees (U. S. Brief, p. 38), from the express authority conferred upon the Commission by Section 15(6) to adjust divisions with an eye to the revenue needs of particular carriers, that facilities which can fill no useful transportation purpose may be constructed for revenue purposes only. The express provision of Section 15(6) goes to emphasize the absence of like authority under Section 1(18)-(20). But in any event it is clear that the record discloses as to the Norfolk no condition of straightened financial circumstances and that the Commission did not authorize the line with any such consideration in mind.

It is said that competition may justify a new line because it will furnish diversified car supply, a stimulus to improved service or insurance against complete failure of service. (U. S. Brief, pp. 40-41). Doubtless a new competing line may be justified by a showing, utterly wanting here (see Opening Brief, pp. 14-16), of inadequacy or liability to failure of existing facilities. But that is not saying that appellant's wholly adequate

and efficient facilities may be duplicated in order to create competition for its own sake alone. "For invasion through new construction of territory adequately served by another carrier, like the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest." *Texas & Pac. Ry.* v. *Gulf, etc., Ry., supra,* (1926) 270 U. S. 266, 278.

IV.

SUNDRY STATEMENTS IN APPELLEES' BRIEFS DEEMED ERRONEOUS OR MISLEADING.

In the briefs under reply there are a number of statements of fact and of position which we do not consider justified on the record, or which, without further explanation, might tend to mislead. To some of these reference has already been made. There are others upon which detailed comment, at any earlier stage of this brief, would have impaired the continuity of presentation, but which we yet feel require notice if the briefs are, in their sum, adequately to present the case. It has accordingly seemed necessary to assemble such matters in a summary way as a separate division of this brief.

Brief of the United States.

There are comparatively few instances of this kind in the brief of the United States, in which the differences from our position are largely as to matters of law and principally result from the variant points of view to be expected from opposing parties. The more important are the following (initial references are to pages of the brief for the United States):

(1) *Need for Coal Reserves.*—Pages 9-10: "* * * the maintaining of adequate tributary reserves by each said carrier is essential to ensure the maintaining of its revenues."

This is obviously correct so far as it goes; but the omission of any reference to the time element is apt to mislead if the statement is intended, as it appears to be,

to imply any need of the Norfolk for increasing its coal reserves. The evidence shows that the Norfolk's reserves, apart from those tributary to the Gilbert-Wharncliffe line, amount to 29,267,307,000 tons of coal, of which 12,727,147,000 is in seams over three feet thick. The evidence does not show the annual shipments of the Norfolk, but it does show that in its entire history there have been extracted 651,658,000 tons over three feet thick, which is only a little more than 5% of the coal over three feet thick and less than 3% of the total reserves (R. 227). It thus appears that the reserves will last for several hundred years.

(2) *"Bottling Up" of Virginian.*—Page 19: "* * * the Virginian 'would still be bottled up'," etc.

This figure of speech was used by the court below. It is, under the facts of the case, quite misleading. The Virginian is entirely dependent upon other carriers for a westbound outlet. If that makes it "bottled up," it will be equally "bottled up" no matter how this case is decided. But by reason of the provision of through routes to the West, and of the Commission's control of divisions, it is not "bottled up," as is most graphically shown by a westbound movement which increased from nothing before 1925 to 3,008,851 tons in 1927 (2,256,638 in nine months; R. 38). If the "bottle" is wide open, its contents are no more "bottled up" if it has one neck than if it has two.

(3) *Effect on Revenue.*—Page 19: "Moreover, the revenue situation would not be wholly cared for by the Commission control over divisions, particularly since the volume of traffic moving from mines on the Virginian may reasonably be expected to be greater if it has connection with both of its competitors in the originating of coal instead of with one only."

But the volume of traffic is determined, not by routes, but by demand, which means, in effect, markets; and there is no showing that any other markets could be reached via the Norfolk than via the appellant's line, except local points on the Norfolk's line, the business to which is "held to be negligible" (R. 39).

(4) *"Preserving" of Competition by Uneconomical Routes.*—Page 32: "But, if traffic always followed the route securing to carriers the greatest operating economies, there would have been no occasion for this suit by the C. & O. to prevent building of the Gilbert-Wharncliffe extension."

This evidences a serious misconception of appellant's theory of the case. It is with the knowledge that traffic *does not always follow* the more economic route that this suit is brought. But this does not mean that traffic *ought not* to follow the more economical route, and still less does it mean that the economy attained through opening a more economical route should be thrown away, in whole or in part, by the simultaneous creation of a less economical one.

In view of repeated references in both briefs to the importance of preserving the competition of the Norfolk, an epitome of the situation seems desirable, based primarily on the cases before the Commission, Dockets Nos. 13832 and 14454 (*Wyoming Coal Co.* v. *Virginian Ry. Co.* (1925), 96 I. C. C. 359, 98 I. C. C. 488), here referred to by stipulation (R. 226). The Virginian was built to haul eastbound coal only, and until forced to handle westbound coal it was its policy to discourage that movement (96 I. C. C. 359, 361-2; 98 I. C. C. 488, 491). The *Wyoming Case* contemplated a westbound route via the Chesapeake and Ohio. The Virginian sought to avoid this by opening the route via Matoaka

and the Norfolk, and closing the Deepwater route. This result the Commission prevented by requiring the Deepwater route to be kept open (*Wyoming Coal Co.* v. *Virginian Ry. Co.* (1928), 142 I. C. C. 681). Accordingly, the forcible conversion of the Virginian into a westbound carrier brought into being two routes to the west, both of them, so far as concerns the Virginian's part of the line, physically disadvantageous. The route via the Norfolk, so far as the Virginian's participation was concerned, was less disadvantageous than that via the Chesapeake and Ohio. Thus the Norfolk became the principal, though the unintended, beneficiary of the change of the Virginian's character from an eastbound carrier only into a two-way carrier. By the construction of its new line the Virginian has now succeeded, in its own interest and in that of the public, in substituting a good route for a poor one. But now that this is in process of accomplishment, it is proposed to impair this advantage, so far as the public is concerned, by opening another and less advantageous route, simply in order that the Norfolk may "preserve" the competition which fortuitously came into being as a result of the Virginian's being forced into the westbound business. In other words, it is proposed here, in the name of affording a cure for an existing transportation evil, to deny a complete one, and to permit the therapeutic measure to take effect only at the price of continuing in part the very condition which it was intended to heal.

(5) *Virginian's Need for "Independence"*.—Page 39: "* * * the Virginian's need for greater independence," etc.

In addition to what is said under (2) above, we would point out that even if the concept of independence admits of degrees of comparison, which may be doubted,

it is impossible to speak of "greater" independence where independence does not exist. What is doubtless meant is that the Virginian would be less dependent upon one carrier. It may be appropriate to repeat, in view of the reference to "fuller car supply and expeditious handling of the traffic," that there is no evidence whatever, nor any finding by the Commission or by the lower court, of any threatened inadequacy in either of these respects.

THE BRIEF OF THE NORFOLK.

In addition to matters already commented on, we briefly summarize the following (initial references are to pages of the Norfolk's brief):

(1) *Specification of Errors.*—Pages 6-8: Two and a half pages of the Norfolk's brief, headed "Specification by Appellant of the Assignments of Error to be Urged", are devoted to a labored effort to show non-compliance on our part with Rule 27 (e) of this Court. The first point made seems to be that a statement that all the assignments of error are relied upon does not constitute "a specification of the errors intended to be urged." If an appellant, as happens to be the case with us, intends to urge all the assignments of error, we know no more definite way of specifying them than by stating that fact.

At pages 253-5 of the record appears the statement of points on which appellant intends to rely, made pursuant to Rule 13, paragraph 9, of this Court. It clearly states the points, but in distributing them to the assignments of errors two mistakes are made which, though quite unimportant—the rule requires no such distribution—we here correct. On page 255 the words "Assignment of Errors No. 6" should read "Assignments of Errors Nos. 6 and 7", and the words "Assignment of Errors

No. 7" should read "Assignment of Errors No. 8". Assignment of Errors No. 1 is the general one that "The Court erred in making the decree" (R. 98), and is implicit in all the points.

Apart from this, the statement in the Norfolk's brief requires no reply.

(2) *Excess Operating and Capital Costs of Norfolk's Line.*—Pages 15-16: "Witness Crawford (R. 215) described the proposed method of operating over that grade and testified that it would add less than one cent a ton to the cost. Witness Marshall (R. 203) estimated the 'direct train service costs' via the route of the Chesapeake and via the proposed Gilbert-Wharncliffe line and testified that the latter would be only 90 cents per car (less than 2 cents per ton) more costly than the route of the C. & O. That witness also showed certain other expenses for the Chesapeake and Norfolk Companies (R. 191-2) from which it will appear that the costs of locomotive and freight car repairs, depreciation and retirements are greater on the Chesapeake Company than on the Norfolk Company, to an extent more than sufficient to overcome an advantage of less than 2 cents a ton."

The statement is both confused and confusing, as it relates or compares diverse and unrelated things. The "one cent a ton" testified to by Mr. Crawford was merely the cost of "doubling" over the mountain between Gilbert and Wharncliffe, and takes no account of the longer haul by that route or other operating conditions. The "90 cents a car" (nearly two cents a ton) testified to by Mr. Marshall relates to the excess direct train service costs only of operation by the Norfolk over those of appellant, computed in each case to Kenova, the common point. Neither of these figures includes

the interest and taxes arising out of the Norfolk's proposed investment of $2,500,000. Figuring these conservatively at 6 per cent, or $150,000 per annum, and assuming the movement at 2,250,000 tons (R. 245), the added cost per ton would be 6.66 cents, or $3.54 per car of 53.2 tons, the average loading (R. 170). This added to the 90 cents per car estimated by Mr. Marshall would give a minimum excess cost of transportation by the Gilbert-Wharncliffe line of $4.44 per car.

The figures of locomotive and car repairs, depreciation, and retirements referred to by the Norfolk are quite meaningless, when used for the purpose to which they are put by the Norfolk, without such supporting and explanatory data as the record does not afford. They may reflect different bases of depreciation charges, different standards of maintenance, or other variant conditions.

The paragraph as a whole is obviously intended to contradict the Commission's finding of fact (R. 56) that

> "Its (the Norfolk's) route would not be as economical for westbound traffic as a route via Gilbert and the C. & O., and requires building a line from Gilbert to Wharncliffe at a cost of $2,500,000."

(3) *Continued Use of Matoaka Route.*—Page 16: "* * * the Matoaka route * * * will be used for large tonnages unless the Wharncliffe line is constructed."

This is pure assumption. The Commission made no such finding. There is no reason why a route involving forty-eight miles of additional haul (R. 39) over unfavorable grades should be so used.

(4) *Erroneous Conception as to "Continuing" Competition.*—Page 17: "The Wharncliffe line will continue the Norfolk Company an active competitor of the Chesapeake."

This brings up the same subject dealt with above in connection with the brief of the United States. In substance it presents the argument that if two bad lines are replaced with one good one, another less good one must be added so that there will still be two. The statement has the fault, patent in both opposing briefs, of viewing the situation from the standpoint of the present arrangement, rather than from that of the arrangement which will come into being when the Virginian's line is built. Since the Gilbert-Wharncliffe line will serve no present purpose until the Virginian's line is built (R. 56), its utility can manifestly be appraised only from the standpoint of the existence of the Virginian's line.

(5) *Erroneous Statement as to Appellant's Position.* — Page 19 (after stating that appellant relies upon *Texas, etc., R. Co.* v. *Gulf, etc., R. Co.* (1926), 270 U. S. 266): "This position of the Appellant originated with the dissenting position of Commissioner Porter (R. 58-64)".

This statement, suggesting that the appellant's position was taken by way of afterthought, is surprising as coming from counsel who participated in the case before the Commission. In point of fact the identical language quoted in the Norfolk's brief from *Texas, etc. R. Co.* v. *Gulf, etc., R. Co.*, was cited by us to the Commission in the Opening Brief in the proceeding out of which this case arose at pp. 35-36, and the case was cited again in the Exception Brief at p. 59, so that it is entirely clear that the point was an integral part of the original presentation in the light of which Commissioner Porter's expression was delivered.

(6) *Inadequacy in Fact as in Law, of Reply to Appellant's Argument Concerning Wasteful Competition.*

—Pages 19-20: "This Commissioner would have denied the certificate because 'the Norfolk and Western is seeking to build into new territory adequately and efficiently served by other carriers,' a statement made under a mistake of fact. The certificate for the Gilbert-Wharncliffe line and the construction and operation of that line will not take one ton of freight or a single passenger from the Chesapeake Company's line to Gilbert now moving by that line."

The imputation of error to Commissioner Porter is scarcely fair, and the ensuing statement is somewhat wanting in ingenuousness. The statement, however, is repeated in many forms, and was, as we have seen, made the basis for a legal argument. We shall first consider its accuracy.

It is idle to suppose that Commissioner Porter was unfamiliar with the existing situation, and we do not understand it to be suggested that he would misrepresent it. He had called attention (R. 59) to the "natural barrier" formed by the mountain ridge between the Guyandot and the Tug River Valleys, constituting the dividing line between the territories served by the appellant and the Virginian, on the one hand, and the Norfolk on the other. It was in this general sense that he referred to the territory north of the ridge as being "adequately and efficiently served by other carriers." Moreover, the Commissioner would have been well justified, for the reasons hereinbefore pointed out (pp. 27-8), in treating the Virginian's new line as a *fait accompli*—a point of view from which the Commissioner's statement is thoroughly justified. It is from this standpoint that we think that counsel must have had tongue in cheek in making the further statement that the Gilbert-Wharncliffe line

> "will not take one ton of freight or a single passenger from the Chesapeake Company's line to Gilbert *now moving by that line.*"

We have italicized the "catch". It is repeated in the next paragraph in the sentence:

> "The territory of construction is not served by any carrier *at the present time*" (Italics supplied).

And counsel are at pains to make it obvious, for they say again (Brief, pp. 21-2):

> "The Gilbert-Wharncliffe line is not a duplicate of any existing line but traverses a territory which has heretofore been without railroad service. There is no evidence that the new line will take a ton of freight or a single passenger from any other existing line."

Without intending offense, we say that this is a mere quibble. Yet, as we have seen, it is made the sole basis for distinguishing the case of *Texas, etc., R. Co.* v. *Gulf, etc., R. Co.* (1926), 270 U. S. 266 and the *Utah Terminal Case* (1922), 72 I. C. C. 89, both cited by us. The familiar chord is again sounded that the Gilbert-Wharncliffe line "will not be a competing line with the Chesapeake line for a pound of freight or a passenger *now moving* over the Chesapeake line west from or east to Gilbert" (Norfolk's brief, pp. 22-23). We think it unnecessary further to labor the obvious point that the national purpose of preventing useless construction must be effectuated in the light of assured as well as of existing construction.

(7) *Horsepen Creek Area.*—Page 25: "Neither the Virginian Company nor the Chesapeake Company proposed to build a line into that territory."

The reference here is to the Horsepen Creek area. The suggested implication is that the demonstrably greater accessibility of that area to the lines of appellant and the Virginian than to that of the Norfolk is neutralized by the fact that neither the Virginian nor the appellant proposed to build a line into that territory. The tacit implication is that the Norfolk did so propose.

The implication is without foundation of fact. All the Norfolk did was to say that a branch 5 miles long, costing $600,000 *would be required* to reach the area (R. 217). It was one of a number of branches concerning which similar statements were made (R. 216-7). The Norfolk did not "propose" to build this line. And we would add that peculiar hardihood was required to make a contrary intimation, for *alone of the three applicants before the Commission did the Norfolk decline to commit itself to immediate construction* of the line which it *did* "propose" to build. The report of the Commission shows the following (R. 49):

> "The C. & O. and the Virginian would commence construction *as soon as authorized* and would complete it in about two years. The testimony for the N. & W. is that it would build the line *whenever business conditions seemed to justify it.*" (Italics supplied).

We refer also to the testimony of Mr. Crawford, General Manager of the Norfolk, upon which this finding of the Commission is based (R. 219):

"By Mr. De Jarnette: Does your railroad contemplate the building of this line immediately if the permit were granted?

"A. We would build this line whenever the business conditions seemed to justify it."

(8) *Misconception as to Record Here.*—Page 29, note: "References are sometimes made to findings of the Commission, instead of to the evidence", etc.

We call attention to this statement, somewhat apologetically made, as evidencing a singular misconception which may account for methods of treatment by the Norfolk otherwise difficult of explanation. It is apparently considered that the *evidence* before the Commission, rather than the *record* before it, constitutes the "evidence" in this suit; and from this circumstance the fact seems to be overlooked that the findings of the Commission constitute by far the more valuable part of the evidence here.

Indeed, in appellant's view, the record now before the Court is in large part wholly unnecessary, and appellant in the first instance submitted a statement of the evidence which included the report of the Commission (including Commissioner Porter's separate expression) but omitted all evidence which merely supported facts admitted in the pleadings and/or set forth in the Commission's report (R. 134). It was only at the direction of the court below, made at the instance of appellees and over the exception of appellant, that the present record, in appellant's judgment quite needlessly extended, is presented to this Court (See memorandum of evidence which appellees desired included in the record, Exhibit A, R. 113-130; appellant's responses, Exhibit B, R. 130, 132; orders of court below, R. 111-112, 246-247).

We have felt it proper thus to disclaim responsibility for the length of this record. Returning to the language of the brief here commented upon, it is doubtless by reason of the apparent conception that the evidence before the Commission, rather than its findings, constitutes the primary evidence in this suit that the Norfolk has (a) felt free, as we do not, to contradict the Commission's findings (as, for example, in respect of the excess cost of operation, etc., of the Gilbert-Wharncliffe line), and (b) undertaken to search in the evidence rather than in the findings for justification of the Commission's action.

(9) *Continuance of Routes Does Not Mean Continuance of Movement.*—Page 31: "Witness Hull . . . stated that the Matoaka route . . . 'already exists, and will continue'."

"The shippers of coal having shown a preference for a route via the Norfolk Company by sending over 80 per cent. of their westbound coal shipments via Norfolk routes, may reasonably be expected to utilize a Norfolk Company route for some substantial volume of traffic in the future."

These two statements may be briefly noticed together. As to both, it is sufficient to observe that the continuance of the *route* does not necessarily or even probably imply a continuance of the *movement,* in the face of the provision of a better route. The second is a perfect *non sequitur,* as it goes to the point of declaring that because shippers have used *one* Norfolk route in the past—and it will be remembered that prior to 1927 no other joint westbound route from Virginian local mines was open—it follows that they will use *some* Norfolk route in the future.

(10) *More About "Bottling Up" the Virginian.*—Page 39: "The Wharncliffe Line is necessary to prevent

the bottling up of the Virginian by having only one active Western outlet at Gilbert."

This graphically illustrates the inaccuracy, not to say the absurdity, of the "bottled up" figure of speech. We hazard the guess that this is the first time in the history of English speech that a thing has been said to be bottled up *by having an outlet.*

(11) *Erroneous Statement as to Application Granted by Commission.*—Page 52: "In the beginning the Norfolk and Virginian Companies made application to the Commission jointly as one line and this (F. D. No. 5161) is the application which the Commission granted to the Norfolk Company for the Wharncliffe Line (R. 240)."

This statement is not only incorrect, but in its context seriously misleading. It is made a part of the argument to show that the Virginian-Norfolk lines together form an indivisible project. The unsoundness of this conception, in the light of the Commission's order of October 20, and for other reasons, has been demonstrated. But let us examine the statement just quoted.

In the first place, the application made by the Norfolk and the Virginian was *not* the application which the Commission granted in part to the Norfolk. The Guyandot and Tug River Railroad Company filed an application, in which the Norfolk and the Virginian joined, on October 29, 1925. On December 24, 1926,* the Guyandot and Tug River filed an amended application, *in which only the Norfolk joined* (R. 33). The order was entered, of course, on the amended, not the original, application.

*The record in this case, following the official report (Construction by Virginian & Western Ry. Co. (1928), 145 I. C. C. 167) gives this date as December 24, 1925 (R. 33), but this is a mistake. As an appendix to this brief we print a certificate from the Secretary of the Commission showing the fact.

The simple explanation of the filing of the amended application lies in the case known as Finance Docket No. 4943, *Control of Virginian Railway* (1926), 117 I. C. C. 67, the report of which, by stipulation (R. 226), can be referred to herein. That case deals with a proposed lease of the Virginian to the Norfolk, the application for an order authorizing which was filed with the Commission July 2, 1925 (117 I. C. C. at p. 68), and was pending at the time the original application was filed. On October 11, 1926, the Commission denied the application and entered an order to that effect (117 I. C. C. 67-85). It thus appears that the Norfolk and the Virginian joined in the original application in the contemplation that their properties would be unified, and that the amended application of the Norfolk, in which the Virginian did not join, was filed after it had become known that this could not be done. The Virginian's separate application was filed January 21, 1927 (R. 33). It thus results that the inference of an indivisible project, manifestly sought to be established by the language quoted from the Norfolk's brief, is not only without foundation, but that the circumstance of the separate filing of the amended application by the Norfolk after the Virginian's lease had been denied emphasizes the fact that the lines were, in truth, wholly separate projects.

V.

CONCLUSION.

The heart of this case, as appellant urges upon the Court, was revealed with admirable succinctness by Commissioner Porter in his dissenting expression. We conclude by pointing to his language, which follows in part:

> "Search may be made of this record in vain to find a scintilla of evidence justifying a finding that the present or future public convenience and necessity require, or will require the construction of this 10.5 miles of railroad. I am abundantly confirmed in this statement by the fact that a search of the opinion of the majority will reveal but a single paragraph even hinting at a reason for this construction. I propose to quote from that paragraph:
>
> > " 'The construction of that part of the N. & W.'s proposed line from Wharncliffe to Gilbert would enable the N. & W. to compete with the Chesapeake & Ohio for westbound traffic from the Guyandot Valley and would assure operators in the territory competive service to the west.'
>
> "This is new and strange doctrine for this Commission to announce as a sole reason for new construction. As far back as in Public-Convenience Application of Utah Terminal Ry., 72 I. C. C. 89-93, wherein it was stated, that the applicant's main contention that a competing line is necessary in order to furnish interstate service in the movement of coal, we said:

" 'So long as the available supply of coal can promptly reach the consuming public over existing lines, it is difficult to perceive how public convenience and necessity can be served by the establishment of competing facilities. "Public convenience and necessity" has been defined as a "strong or urgent public need," Wis. Telephone Co. v. Railroad Comm., 162 Wis. 383; 156 N. W. 614. A public need can hardly be predicated upon the demand of three shippers who may desire to introduce the element of competition in order to improve their position in their own competitive field. While one of the purposes of the Transportation Act, 1920, was to preserve competition between carriers, the provisions of paragraphs (18) to (20), inclusive, of section 1 negative any presumption that it was the purpose of Congress to permit the construction of new and competitive lines of railroad where existing facilities are adequate or can be made so by the exercise of available administrative remedies.'

" * * * This sole reliance of the majority was effectively answered by Commissioner Woodlock in Construction of Lines in Eastern Oregon, supra, where he said:

" 'Congress has enjoined upon the Commission the duty of "preserving competition" so far as possible in the grouping of railroads through consolidation. If, however, it had desired to introduce yet more "competition" into the industry, through control in the hands of this Commission over new construction and extensions, it would doubtless have instructed us to that effect, instead of referring us to "public convenience and necessity" as the test to be applied to new projects. "Competition" means alterna-

tive service available to a shipper or a district; it implies existence at all times of more facilities than are actually needed to move the traffic. The law clearly contemplates that railroad plant in existence shall, as a whole, receive a "fair return" from the rates. It is impossible, therefore, to avoid the conclusion that when Congress gave us power to govern new construction it did so with the intent that we should prohibit the building of unnecessary new facilities. New facilities become necessary when existing facilities become inadequate. "Monopoly" is not necessarily synonymous with inadequacy. "Competitive" facilities are not "necessary" merely because they are "competitive." Doubtless, every shipper is ready at all times to welcome another railroad into his territory; doubtless every railroad is ready at all times to enter another railroad's territory and share the business that the other has developed; doubtless no railroad desires a new "competitor"; these are all very natural states of mind. But somebody must pay for the new facilities and they must be supported by the rates.'

"To sum up, then, we have a situation where the construction by the Virginian of this link between Itmann and Gilbert will form a splendid arrangement for traffic originating thereon as well as for some Chesapeake & Ohio coal moving eastbound to tidewater from the Lower Guyandot Valley and Virginian coal moving westbound from the Upper Guyandot Valley. The service will be complete and for aught we know will be fully adequate to meet the needs of shippers along the line. Assuming for the moment that the line as so constructed is in operation. Under the power conferred upon us by paragraph (18) of Section 1, as so ably interpreted in Texas & Pac. Ry. v. Gulf, Etc., Ry., 270 U. S. 266, as follows:

" 'but where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress, of national concern. For invasion through new construction of territory adequately served by another carrier; like the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the public interest.'

"we should and undoubtedly would consider very carefully the proposed entry of another line at a cost of two and one-half millions of dollars to be added to the financial structure upon which a fair return should be earned. In this case the majority conceive, even before the Virginian's line is built, that another carrier will be 'required' in the public interest to serve this territory. In this conception they rely, not upon the claim of any prospective shipper, or shippers, but apparently upon the theory that competitive service might prove desirable and with a hint that construction of the line by the Norfolk & Western might induce it 'to permit the exploitation of the lands of the Pocahontas Company, provided it received the westbound tonnage therefrom at Wharncliffe.'

"On the question of competition I agree wholeheartedly with the remarks of Commissioner Woodlock in the Oregon Case which I have quoted. If 'exploitation' of the Pocahontas Company coal lands is to be dependent upon haulage of the coal by the Norfolk & Western, it may be that its exclusion from this territory will have the wholesome effect of avoiding the over-production suggested by this carrier on brief as a possible reason for denying all of the applications.

"I am unable to distinguish the facts and the law here under consideration from that dealt with by the Supreme Court of the United States in Texas & Pac. Ry. v. Gulf, Etc., Ry., supra. It will be recalled that in that case the Santa Fe wished to build a line into an industrial district, 2½ miles west of the city of Dallas, Texas, theretofore not reached by any of its lines but which was being served by the Texas & Pacific. In that case, the Santa Fe was seeking to build into new territory, adequately and efficiently served by another carrier. Here the Norfolk & Western is seeking to build into new territory, adequately and efficiently served by other carriers. There, they sought to build a line 7½ miles in length, involving but two small trestles and numerous ordinary fills and cuts. Here they seek to build 10½ miles over a high mountain ridge. There they sought to build at a cost of $500,000. Here they seek to build at a cost of $2,600,000. Here the majority hold that, for competitive reasons, the line may be built. As for me, I prefer to follow the reasoning of the Supreme Court and our own holdings and deny this construction."

Respectfully submitted,

HERBERT FITZPATRICK,
ROBT. B. TUNSTALL,
THOMAS L. PRESTON,
Counsel for Appellant.

Richmond, Va.,
January 14, 1931.

Appendix

INTERSTATE COMMERCE COMMISSION

WASHINGTON

I, GEORGE B. MCGINTY, Secretary of the INTERSTATE COMMERCE COMMISSION, do hereby certify that the amended application of the Guyandot and Tug River Railroad Company, for authority to construct a line of railroad in Wyoming and Mingo Counties, West Virginia, Finance Docket No. 5161, was filed on December 24, 1926, the application being joined in by the Norfolk and Western Railway Company only. The statement in the official report of the case, which is embraced in Finance Docket No. 6067, *Construction of Line by Virginian and Western Railway Company*, 145 I. C. C. 167, at page 168, that the said amended application was filed December 24, 1925, is a typographical error, the correct date being as stated above, December 24, 1926.

Seal of Interstate Commerce Commission.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the Seal of said Commission this 12th day of January, A. D. 1931.

(S) GEORGE B. MCGINTY,
Secretary of the Interstate Commerce Commission.